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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WILLIAM NESH, Plaintiff and Appellant, v. DYNOIL REFINING etc., et al., Defendants and Appellant.	B205764 (Los Angeles County Super. Ct. No. NC036291)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick Madden, Judge. Affirmed.

Law Office of Herb Fox, and Herb Fox, for Plaintiff and Appellant William Nesh.

Wise Pearce Yocis & Smith, Michal J. Pearce, and Stephen M. Smith, for Defendant and Appellant Vernon Wright.

In the underlying action, William Nesh asserted claims for breach of contract and fraud against Vernon Wright and several corporations, alleging that he made $675,000 in loans to Wright and the corporations, which remain unpaid. The trial court determined that Nesh was entitled to an award of $50,000, for which Wright was liable due to his "alter ego" relationship with the corporations. Nesh noticed an appeal from the judgment, contending that the evidence at trial established that he was owed $675,000; Wright noticed a cross-appeal, contending there was insufficient evidence to support his liability for the damages under "alter ego" principles. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Nesh initiated the underlying action in November 2004. His second amended complaint asserted claims for breach of contract, negligent misrepresentation, and fraud against Wright, Sherry Ford (Wright's wife), Dynoil Refining, L.L.C., Dynoil Holdings, Ltd., Dynoil L.L.C., Dynex Corporation, and Dynagra Corporation, and sought compensatory and punitive damages.[1] The complaint alleged the following facts: Wright and Ford controlled the remaining corporate defendants, which functioned as Wright's and Ford's alter egos. Nesh made a series of loans to the defendants totaling $675,000. On June 28, 2002, Wright executed a promissory note on behalf of the corporate defendants that confirmed their obligation to repay the debt at a rate of $50,000 per month (plus 10 percent interest per annum), beginning in September 2002. The defendants never complied with their obligations under the note.

During discovery, Wright failed to respond to Nesh's second set of requests for admissions (RFAs), and the trial court ruled that the RFAs would be deemed

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[1] Of the defendants, only Wright is a party to this appeal and cross-appeal.

admitted at trial. Only Nesh, Wright, and Dynoil Refining appeared for trial.[2] Following a three-day bench trial, the trial court filed a statement of decision and a judgment on December 6, 2007. In the statement of decision, the trial court found (1) that Nesh had established only that he made two loans to Dynex Corporation totaling $50,000, and (2) that the corporate defendants were Wright's alter egos. The judgment awarded Nesh $50,000 in compensatory damages for breach of contract and fraud, and $4,066.85 in prejudgment interest.[3]

DISCUSSION

A. *Appeal*

Nesh contends that the trial court erred in awarding him only $50,000 in compensatory damages. We disagree.

1. *Standard of Review*

To the extent Nesh contends there is inadequate evidence to support the trial court's factual findings, we examine the record for the existence of substantial evidence. On review for substantial evidence, our inquiry "begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of

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[2] Neither Dynex Corporation nor Dynagra Corporation answered the complaint, and defaults were entered against them. A default was also entered against Dynoil Holdings, Ltd., after the trial court struck its answer due to its failure to respond to discovery. At the inception of the trial, Nesh dismissed his claims against Ford.

[3] The trial court found that Nesh had suffered $50,000 in damages for breach of contract, and that he could recover no additional damages on his fraud claims.

fact], and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) However, "substantial evidence" is not "'synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value. . . .' [Citation.]" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) Finally, "in all cases, the determination whether there was substantial evidence to support a finding or judgment must be based on the whole record. The reviewing court may not consider only supporting evidence in isolation, disregarding all contradictory evidence." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 412.)

2. *Showings and Decision*

At trial, Nesh testified that he is a personal injury attorney with an office in Woodland Hills. In 1993 or 1994, he represented Sharlis Noghli, who had been involved in an automobile accident. Noghli told Nesh that he worked as a "mandate" -- that is, special representative -- for Wright, who was active in the oil and gas business.[4] Through Noghli, Nesh met Wright. According to Nesh, "Wright was a very charming, very articulate person. He came across very, very well. [He h]ad all the trimmings of someone who's very successful. [He] dressed in beautiful suits, drove a Bentley, lived in Newport Beach."

Wright hired Nesh to prepare correspondence and contracts for Wright's companies, which Wright told him operated in China and Saudi Arabia, and dealt in oil, gas, liquid natural gas, and urea. According to Nesh, Wright often referred

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[4] Nesh testified that "mandate" is a term used in the oil and gas business for an agent or representative of a person or entity.

to the companies as the "Dynoil Group." Wright provided Nesh with a corporate history and profile that identified "Dynoil Holdings Limited" as a holding company that owned "Dynoil Limited" and "Dynagra Limited," as well as several other businesses whose names began with "Dyn." Wright also provided Nesh with documents that described "Dynex Corporation" as an affiliate of "Dynoil Limited," and identified Wright as Chief Executive Officer of "Dynoil Refining, L.L.C." Wright told Nesh that he and his wife, Sherry Ford, owned and controlled the companies within the Dynoil Group.

Shortly after Wright engaged Nesh, he asked Nesh for "bridge capital" to keep his ventures going because he was short of "liquid cash." In response, Nesh loaned Wright approximately $40,000. Wright asked for more loans, explaining that he needed bridge capital or funds to pay performance guarantees and commissions. Wright often arranged these loans through Noghli.

According to Nesh, over a period ending in 2002, he made additional loans to Wright at a rate of 25 to 35 loans per year. Nesh wrote checks payable to Wright, Ford, or one of Wright's companies, in accordance with Wright's directions. To fund the loans, Nesh relied on his own revenue and also borrowed money from family members and clients. He believed the loans would be repaid because Wright showed him accounting documents that set the value of Wright's companies at more than $1 billion.[5] None of the loans were, in fact, repaid. When Nesh asked Wright to discharge the debt in 2004, Wright responded that Nesh "couldn't prove it."

Nesh testified that he lost most of his records regarding the loans when the

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[5] According to Nesh, Wright said that although Credit Suisse provided a credit line to finance his transactions, he needed additional loans to cover incidental expenses.

computer system in his law office crashed, and that a diligent search produced few additional records. He relied on several documents to establish the loans. According to Nesh, in 1996 he provided Wright a $4,000 check payable to "Dynex." The check was dated October 7, 1996, and drawn on the general account of Nesh's law office. Shortly thereafter, Nesh provided Wright a $46,000 check payable to "Dynex Corporation." The check was dated November 12, 1996, and drawn on Nesh's personal checking account.

In October 1997, Nesh asked Wright to memorialize "where [they] were officially." On October 29, 1997, Wright, acting as CEO of "Dynoil Limited," executed a promissory note on behalf of the company for $365,000, plus 10 percent interest per annum. On October 30, 1997, Nesh issued Wright a $15,000 check drawn on Nesh's client trust account and payable to "Dynex/Dynoil." On January 16, 1999, Wright sent Nesh a letter stating that "Dynoil" owed Nesh $360,000. Two days later, on January 18, 1999, Wright sent Nesh a second letter stating that "Dynoil" owed Nesh $406,000. According to Nesh, the second letter corrected Wright's error in the first letter regarding the total sum owed to Nesh. On June 4, 1999, Nesh issued a $6,000 check payable to Ford from Nesh's client trust account. The memo line on the check stated "Loan Dynoil."

In 2002, when Wright requested a $10,000 loan, Nesh asked for an "update" for the balance owed, including the requested funds. On June 28, 2002, Wright sent Nesh a letter stating: "[T]he current amount owed to you by Dynoil Refining LLC and/or Dynoil LLC is approximately $675,000. This shall serve as an undertaking that the amount will be retired at the rate of $50,000 per month beginning in September, 2002." At Wright's direction, Nesh deposited funds totaling $9,996.33 in a bank account.[6] The funds comprised $3,000 in cash and a

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[6] Nesh testified that he was unable to loan the full $10,000.

$6,996.33 check drawn on Nesh's client trust account and payable to "Sherri Ford." According to Nesh, this was his final loan.

Wright testified that he was the owner and chief executive officer (CEO) of Dynoil Refining, that at various times he had been the CEO of Dynoil Holdings, L.L.C., Dynoil Limited, and Dynex Corporation, and that he was an officer and director of Dynagra Corporation. According to Wright, Noghli was neither his employee nor agent, but a broker who sometimes presented him with proposed deals from Nesh. Wright denied that the defendants -- including himself -- owed any money to Nesh.

According to Wright, Noghli, acting on Nesh's behalf, first brought him a proposed deal in 1994. Wright and some of the corporate defendants later hired Nesh to perform legal services for them. Nesh and Noghli also proposed "thousands of deals" to Wright, none of which "actually concluded." Wright denied that Nesh's documents constituted promissory notes or evidence of loans. The documents that appeared to acknowledge debts to Nesh -- including the purported promissory note dated June 28, 2002 -- were prepared in anticipation of funds Nesh was to provide to the defendants regarding proposed transactions.[7] Because Nesh never gave the funds to the defendants, the transactions never occurred.

Noghli testified that he first met Wright in the early 1990's. Wright told him that he was the owner and CEO of the companies within the Dynoil Group, and hired Noghli to execute contracts on behalf of the companies. After Nesh began performing legal work for the companies, Noghli acted as an intermediary between

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[7] Wright also testified that some references to "sums advanced" in certain documents described funds that Nesh alone owed to Noghli for work Noghli had performed as Nesh's agent.

Nesh and Wright. Wright told Noghli that Nesh was making loans to Wright, and sent him to collect checks from Nesh. Noghli often obtained two or three checks a month from Nesh, ordinarily payable to Wright, Dynoil Group companies, or Ford. According to Noghli, Nesh loaned Wright more than $600,000. Noghli ended his employment with Wright in 2004.

The trial court determined that the RFAs deemed admitted as a result of Wright's failure to respond established the following facts: Nesh gave Noghli funds to be deposited in bank accounts designated by Wright. (RFA No. 14.) The funds came from Nesh or his clients, and were loans to Wright or to companies of which he was an officer, including the corporate defendants. (RFA Nos. 14 & 15.) On November 12, 1996, Wright received a $46,000 check payable to Dynex Corporation, which he deposited in his personal banking account. (RFA Nos. 29 & 30.) On October 29, 1997, Wright issued a $365,000 promissory note to Nesh, but never repaid the loans underlying the note. (RFA Nos. 27 & 28.) The next day, Wright received a $15,000 check from Nesh payable to "Dynex/Dynoil," which was deposited in Wright's personal account. (RFA Nos. 33 & 34.) On January 16, 1999, Wright sent Nesh a letter acknowledging a $406,000 loan from Nesh, but never repaid the loan. (RFA Nos. 24, 25 & 26.) On October 1, 1999, Wright received $16,000, which he deposited in his personal account. (RFA No 31 & 32) Wright sent a letter dated June 28, 2002, acknowledging a loan from Nesh for approximately $675,000. Wright agreed to repay the loan, but did not intend to do so, and did not. (RFA Nos. 21, 22 & 23.) The same date, Wright received $10,000 from Nesh, which was deposited in Wright's personal account. (RFA No. 35)[8]

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[8] The RFAs in question are as follows: "15. Admit that Sharlis Noghli received funds as loans from William Nesh or his client's to be deposited into bank accounts for Dynoil Holdings Limited, Dynoil Limited, Dynex Corp., Dynagra Corp., Uniol (Hong Kong) Limited, Uniagra and Dynoil Refingin [*sic*], LLC.

The trial court concluded that the RFAs, viewed in isolation, did not establish that Wright owed Nesh $675,000 or any other specific amount, reasoning that "[t]he fact that a promissory note was issued . . . does not conclusively establish that Nesh loaned Wright money." The trial court further concluded that the trial evidence and RFAs, take together, established that Nesh was entitled to recover no more than $50,000, that is, the sum of the October 7, 1996, check for $4,000 payable to "Dynex" and the November 12, 1996 check for $46,000 payable to "Dynex Corporation," both of which were drawn on Nesh's accounts. The trial court rejected Nesh's claims for a larger recovery based on the $675,000

[¶] . . . [¶] 20. Admit that you sent a letter Dated [*sic*] June 28, 2002, acknowledging a loan from William Nesh for approximately $675,000.00. [¶] 21. Admit that you agreed to repay the loan from William Nesh at $50,000.00 per month. [¶] 22. Admit that you never repaid any money that defendants owed to William Nesh. [¶] 23. Admit that you never intended to repay any loan received from William Nesh or his clients. [¶] 24. Admit that you sent a letter dated January 16, 1999, acknowledging a loan from William Nesh of $406.000.00 [*sic*][.] [¶] 25. Admit that you agreed to retire the loan from William Nesh of $406,000.00 at $67,666.66 per month starting March 1, 1999. [¶] 26. Admit that you never repaid any of the loan from William Nesh of $406,000.00. [¶] 27. Admit that on October 29, 1997[,] you issued a promissory note in the amount of $365,000.00 in favor of William Nesh. [¶] 28. Admit that you never repaid any of the loans on the October 29, 1997 promissory note. [¶] 29. Admit that you received a check for $46,000.00 from William Nesh made payable to Dynex Corporation on November 12, 1996. [¶] 30. Admit that the $46,000.00 check made payable to Dynex Corporation was deposited into your personal bank account. [¶] 31. Admit that on October 1, 1999[,] you received a deposit in the amount of $9,000.00 in your personal bank account. [¶] 32. Admit that on October 1, 1999[,] you received a deposit in the amount of $7,000.00 in your personal bank account. [¶] 33. Admit that on October 30, 1997[,] you received a check from William Nesh in the amount of $15,000.00 made payable to Dynex/Dynoil. [¶] 34. Admit that the $15,000.00 check made payable to Dynex/Dynoil was deposited into you [*sic*] personal bank account. [¶] 35. Admit that on June 28, 2002[,] you received a deposit of approximately $10,000.00 in your personal bank account from William Nesh."

promissory note dated June 28, 2002, reasoning that Nesh failed to show that he had loaned the total sum stated in the note. The trial court also denied Nesh's claim based on the October 30, 1997 check for $15,000 payable to "Dynex/Dynoil," the June 4, 1999 check for $6,000 payable to Sherry Ford related to a "Loan Dynoil," and the June 28, 2002 check for $6,996.33 check payable to "Sherri Ford," reasoning that Nesh lacked standing to recover funds that he had taken without authorization from his client trust account.

3. *Analysis*

Nesh contends that the trial court improperly limited his recovery to $50,000 in damages. His central contention is that he was entitled to recover the full amount of $675,000 recited in the June 28, 2002 promissory note. He argues (1) that the RFAs deemed admitted at trial conclusively established his entitlement to recover $675,000, and (2) that the note itself constituted a prima facie showing regarding his entitlement that Wright failed to rebut. For the reasons explained below, we disagree.

We begin with Nesh's contention regarding the RFAs deemed admitted at trial. Generally, "Code of Civil Procedure section 2033.010 et seq. authorizes parties to propound requests for admissions. A matter admitted in a response to a request for admissions is 'conclusively established against the party making the admission . . . unless the court has permitted withdrawal or amendment of that admission . . . . (Code Civ. Proc., § 2033.410, subd. (a); . . . .) Trial courts have the discretion to consider parol evidence that explains an admission. [Citation.] However, while courts may utilize evidence to elucidate and explain an admission, they cannot use such evidence to contradict the plain meaning of a response to a request for admissions. [Citation.] If a response to a request for admission is unambiguous, and is not subject to different meanings, the matter admitted is

conclusively established. [Citation.]" (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 259-260.)

The scope of the trial court's discretion to interpret RFAs in light of extrinsic evidence was clarified in *Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272 (*Fredericks*) and *Burch v. Gombos* (2000) 82 Cal.App.4th 352 (*Burch*). In *Fredericks*, a movie theater operator negotiated with a contractor to furnish the interior of a movie theater. (*Fredericks*, *supra*, 189 Cal.App.3d at pp. 274-275.) The contractor sent the operator an offer which included a payment schedule. (*Ibid*.) After the operator accepted the offer and paid a deposit, he discharged the contractor for failing to make adequate progress on the project, and the parties sued each other for breach of contract and restitution. (*Id*. at p. 276.) During discovery, the operator admitted an RFA that stated he had agreed to make payments in accordance with the contractor's payment schedule. (*Ibid*.) At trial, the contractor, relying on the RFA, contended that the operator had breached the contract before the contractor failed to perform under it. (*Ibid*.) Despite the RFA, the trial court concluded that the parties had not agreed that the payment schedule would be binding even if the contractor made no progress, and entered judgment in the operator's favor. (*Ibid*.)

In affirming the judgment, the appellate court stated: "Although admissions are dispositive in most cases, a trial court retains discretion to determine their scope and effect. An admission of a fact may be misleading. In those cases in which the court determines that an admission may be susceptible of different meanings, the court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in the light of other evidence." (*Fredericks*, *supra*, 189 Cal.App.3d at p. 277.) As both parties had submitted evidence that they did not regard the dates in the payment schedule as "sancrosanct," the appellate court concluded that the RFA "established that [the

operator] had agreed to a payment schedule, but parol evidence established that the payments were subject to performance." (*Id*. at p. 278.)

In *Burch*, the owners of some private property fell into a dispute with a logging company over whether the logging company was entitled to use a state-created fire road that crossed the owners' property. (*Burch*, *supra*, 82 Cal.App.4th at p. 356.) During discovery in the ensuing litigation, the logging company admitted an RFA that stated that it had no evidence that the road had been used for public recreational purposes prior to a specified date. (*Ibid*.) At trial, over the owners' objection, the trial court permitted the logging company to present such evidence. (*Id*. at pp. 357-358.) The appellate court affirmed the ruling, reasoning that the trial court "properly found that the admission was limited to [the logging company's] knowledge as of the time the admission was made; it was not some sort of promise that [the logging company] would not locate evidence in the future." (*Id*. at p. 360, fn. omitted.)

Here, Nesh testified that "a lot of" the $675,000 in loans he sought to recover from Wright and the corporate defendants came from Nesh's family members and clients. According to Nesh, in some cases, the family members and clients made out checks directly to Wright or his companies. Nesh denied that he sought to recover these funds as the representative or assignee of the family members; instead, he characterized all such transfers as loans to himself, and stated that he had repaid the family members and clients from his own funds. Nesh provided no documentary evidence regarding the funds purportedly obtained from family members and clients. He testified that neither his family members nor his clients had records of checks payable to Wright or his companies, and that he lacked records of any repayments to family members. Nesh identified only one client who had a record of a loan that he had repaid, and acknowledged that other clients had no such records. The trial court concluded that Nesh's testimony was

insufficiently credible to establish his entitlement to recover $675,000, as Nesh acknowledged that this sum encompassed funds directly transferred by third parties to Wright and his companies, and Nesh lacked any records showing that these transfers amounted to loans to him.

In our view, the trial court was entitled to reject Nesh's testimony that the funds transferred directly to Wright from Nesh's family members and clients were, in fact, loans to Nesh that he repaid. Generally "it is for the trial court to evaluate the credibility of witnesses [citation] and the judge may 'disregard the testimony of any witness, or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced. . . . A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story.' [Citation.]" (*Tom Thumb Glove Co. v. Han* (1978) 78 Cal.App.3d 1, 5.) We reject the trial court's credibility determinations only when they are entirely unreasonable in light of the record. (*Ibid*.) That is not the case here.

In view of the extrinsic evidence, the trial court properly found that the RFAs concerning the $675,000 promissory note did not conclusively establish Nesh's entitlement to recover the full amount of the note. The RFAs asked Wright to admit that he executed the note, which contained an agreement he did not honor, and never intended to honor; they did not unambiguously request Wright to admit

that Nesh was, in fact, entitled to the sum identified in the note.[9] As Nesh acknowledged that some of the funds he sought to recover were provided directly to Wright and his companies by third parties, the trial court properly determined the scope and effect of the RFAs "in the light of other evidence." (*Fredericks*, *supra*, 189 Cal.App.3d at p. 277.)

Nesh also contends that the $675,000 note raised a presumption that Nesh had loaned the full amount stated in the note, and that Wright failed to rebut this presumption. He is mistaken. Evidence Code section 622 states: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration." Thus, "the maker of a promissory note may prove the actual consideration given for it and may prove that the actual amount of the indebtedness is less than the face of the note. [Citations.]" (*Powell v. Johnson* (1942) 50 Cal.App.2d 680, 683.) The allocation of the evidentiary burdens on this matter is established by Civil Code sections 1614 and 1615.[10] "'A promissory note is presumed to have been given for a sufficient consideration under section 1614 of the Civil Code[,] and in an action thereon, the introduction of the note in evidence establishes a *prima facie* right to recover according to its terms. The burden of showing a want of consideration, under section 1615 of that code, is cast upon the party seeking to avoid it, and if he fails to make this showing, the presumption prevails and furnishes sufficient evidence to support a

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9 See footnote 9, *ante*.

10 Civil Code section 1614 states: "A written instrument is presumptive evidence of consideration." Civil Code section 1615 states: "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

finding that the note was given for a good and valuable consideration.'" (*Meyer v. Glenmoor Homes, Inc.* (1966) 246 Cal.App.2d 242, 258-259, quoting *DeTray v. Higgins* (1939) 31 Cal.App.2d 482, 494.)

Because the presumption in Civil Code sections 1614 and 1615 operates solely to affect the burden of producing evidence, we will affirm the trial court's determination that Nesh was not entitled to recover the face value of the June 28, 2002 note if the record discloses substantial evidence that Nesh did not, in fact, loan Wright and the corporate defendants $675,000.[11] (*Estate of Obernolte* (1979)

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[11] In *Rancho Sante Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 883-884, the court concluded that the evidentiary burden at issue in Civil Code sections 1614 and 1615, is the burden of producing evidence, rather than the burden of proof. As the court explained: "'"Burden of proof" means the obligation of a party to establish by evidence a *requisite degree of belief* concerning a fact in the mind of the trier of fact or the court.' (Evid. Code, § 115; italics supplied.) The burden of producing evidence is 'the obligation of a party to introduce evidence *sufficient to avoid a ruling against him* on the issue.' (Evid. Code, § 110; italics supplied.) [¶] Initially these burdens coincide. The party having the burden of proof must offer evidence so that the trier may have a basis for finding in his favor. [Citation.] During the course of the trial, however, the burden of producing evidence 'may shift from one party to another, irrespective of the incidence of the burden of proof. For example, if the party with the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party, whether or not the presumption is one that affects the burden of proof.' [Citation.]" (*Rancho Sante Fe Pharmacy, Inc. v. Seyfert, supra*, 219 Cal.App.3d at p. 880.) The court determined (1) that a written promissory note will carry the creditor's burden of proof regarding consideration *unless* the debtor rebuts the presumption that the consideration is correctly stated in the note, and (2) that the creditor otherwise retains the burden of proof on all issues during trial. (*Id*. at pp. 883-884.)

91 Cal.App.3d 124, 129 [a presumption affecting the burden of producing evidence regarding a fact "exists only until rebutted by substantial evidence"].) As Wright testified that Nesh made no loans, and the trial court otherwise properly found that Nesh's testimony regarding the total amount of his loans -- as recited in the June 28, 2002 promissory note -- was not credible, we see no error in the trial court's determination. In short, the trial court did not err in limiting Nesh's recovery to those sums Nesh could demonstrate he personally loaned to Wright.

Finally, Nesh contends that he was entitled to recover $27,996.33 in funds taken from his client trust account, namely, the October 30, 1997 check for $15,000, the June 4, 1999 check for $6,000, and the June 28, 2002 check for $6,996.33. Rule 4-100 of the Rules of Professional Conduct obliges attorneys to place "[a]ll funds received or held for the benefit of clients" to be "deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account[,]' or words of similar import . . . ." In holding the funds, the attorney acts as the client's fiduciary (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 330, fn. 7), and thus the attorney's personal use of funds from the account may constitute misconduct under the rule. (See *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 875-876.) In denying Nesh's request for the funds, the trial court reasoned that the funds belonged solely to Nesh's clients and that he lacked standing to seek their recovery. Nesh argues that he was entitled to recover the funds as the trustee of the client trust account.

Nesh testified that clients authorized him to make the loans funded by the October 30, 1997 check for $15,000 and the June 4, 1999 check for $6,000, but he was unable to recall the clients' names. Regarding the June 28, 2002 check for $6,996.33, Nesh testified that the underlying funds belonged to his brother-in-law. According to Nesh, his brother-in-law loaned the funds to him, which he repaid. Nesh also acknowledged that when, at Wright's direction, he deposited the check

in Wright's bank account, he forged the signature required to endorse the check. The trial court found that Nesh failed to show that the funds were loans from clients that Nesh repaid. We see no basis to reject this credibility determination.

The remaining question is whether the trial court, having declined to credit Nesh's testimony that he was authorized to use the funds, was nonetheless required to permit Nesh to recover the funds. Section 141, subdivision (1), of the Restatement of Restitution provides: "A person who has taken from the possession of another, or has received from or on account of another, things in which a third person has an interest which is superior and antagonistic to the interest of the other, cannot defeat the claim of the other for restitution merely because of such superior interests." However, as comment a to section 141 explains, "the fact that a third person has a superior and antagonistic interest may, under some circumstances, be a defense if all the facts could be known." (Rest. Restitution, § 141, com. a, p. 565; see Rest. Restitution, § 140 ["A person may be prevented from obtaining restitution for a benefit because of his criminal or other wrongful conduct in connection with the transaction on which his claim is based."].) As the court explained in *Lauriedale Associates, Ltd. v. Wilson* (1992) 7 Cal.App.4th 1439, 1448-1449, restitution is properly denied to a fiduciary when it will produce unjust enrichment, that is, a "violation or frustration of the law or opposition to public policy," or some other inequitable result.

Assuming Nesh could have sought recovery on behalf of his clients, the record is clear he did not do so. On the contrary, he claimed that, having repaid the funds taken from the trust account, he was entitled to personally recover those funds. In light of the trial court's rejection of Nesh's claim that he had repaid the funds taken from the trust account, the trial court was not required to order those funds returned to him for his personal use.

B. *Cross-Appeal*

Wright contends the trial court erred in determining that he is liable for the debts of the corporate defendants. He argues that there is insufficient evidence that the corporate defendants are his alter egos. We disagree.

Generally, "two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.] (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) We review the trial court's determination that these conditions obtain for the existence of substantial evidence. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 840.)

As the alter ego doctrine is equitable in nature, it is applied "only when the ends of justice [] require." (*Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 301.) However, "[b]ecause it is founded on equitable principles, application of the alter ego 'is not made to depend upon prior decisions involving factual situations which appear to be similar. . . . "It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of each case."' [Citations.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248, quoting *McLoughlin v. L. Bloom Sons Co., Inc.* (1962) 206 Cal.App.2d 848, 853.)

Factors relevant to the existence of an alter ego relationship include the commingling of funds and other assets, the failure to separate the assets of separate entities, the treatment of the corporation's assets as those of an individual or other corporation, holding out that the individual or other corporation is personally liable for the first corporation's debts, the failure to maintain separate records or the

commingling of the records of the entities, identical equitable ownership in the two entities, the equitable owners' domination and control of the entities, the use of the same business location, the employment of the same employees, the use of the corporation as a mere shell or instrumentality for the conduct of the affairs of another entity, the failure to maintain arm's length transaction between entities and the diversion of assets. (*Associated Vendors, Inc. v. Oakland Meat Co.*, *supra*, 210 Cal.App.2d at pp. 838-840; see *Roman Catholic Archbishop v. Superior Court* (1971) 15 Cal.App.3d 405, 411.)

The record discloses ample evidence of (1) a unity of interest and ownership between Wright and the corporate defendants and (2) a potential for an inequitable result were Wright not held liable for the corporate defendants' debts. According to Nesh, Wright told him that the Dynoil Group was owned and controlled by Wright and Ford; Noghli provided similar testimony. Moreover, throughout the period Wright solicited loans from Nesh, he displayed indifference to the identity of the corporate debtor, and deposited checks from Nesh payable to the corporate debtor into his own personal account.

As explained above (see pts. A.2 & A.3, *ante*), Nesh established that in 1996 he made $50,000 in loans to "Dynex" or "Dynex Corporation." According to the RFAs deemed admitted at trial, the funds from one of these loans -- a $46,000 check payable to Dynex Corporation -- were deposited directly into Wright's personal bank account. (RFA Nos. 29 & 30.) When Wright memorialized Nesh's loans in October 1997, he executed a promissory note to Nesh as CEO of "Dynoil Limited." Shortly thereafter, Nesh made a $15,000 loan to "Dynex/Dynoil" from his client trust account. When Wright again memorialized Nesh's loans in January 1999, he sent Nesh a letter identifying "Dynoil" as the debtor. The letter bore the names "Dynoil Holdings Limited" and "Dynoil L.L.C.,"and identified Wright as CEO. In June 1999, Nesh issued a $6,000 check from his client trust account

payable to Ford on which was written, "Loan Dynoil." Again, in June 2002, Nesh issued a $6,996.33 check payable to Ford which he deposited directly into Wright's account. Wright's final promissory note identified the debtors as "Dynoil Refining LLC and/or Dynoil LLC."[12]

In addition, there was considerable evidence that Wright operated the corporate defendants as a sham. Nesh testified that Wright provided him with financial documents that convinced him that the Dynoil Group was "a very wealthy group of companies." Among these documents was an internal audit for "Dynoil Holdings Limited," which Nesh understood to be the principal company within the group. The audit, dated January 12, 1999, was purportedly prepared by a certified public accountant with a Century City business address. Nesh later learned that no such accountant existed. During discovery, Wright and the other defendants provided Nesh with a document that resembled the cover letter on the January 1999 audit, but which had purportedly been prepared by "William Nesh and Partners [¶] Attorneys at Law and Certified Public Accountants." The document, which was dated January 13, 1999, stated: "We have audited the accompanying consolidated balance sheets of Dynoil Investment Limited and its subsidiaries . . . ." According to Nesh, he never authorized Wright to prepare the document.

Wright contends that he cannot be liable for the $50,000 debt owed by the Dynex Corporation, pointing to his own testimony that Dynex Corporation is a public corporation with 400 stockholders. This argument misapprehends our role as an appellate court. Review for substantial evidence is not trial de novo. (*Angela*

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12 There was also evidence that Wright used corporate proceeds for his own benefit. As the court noted, Wright paid court-ordered sanctions against himself and the other defendants with a check drawn on a bank account owned by Dynoil Refining, L.L.C.

S. v. Superior Court (1995) 36 Cal.App.4th 758, 762.) On review for substantial evidence, "all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 Cal.2d 520, 527.) That is the case here.[13] In sum, there is substantial evidence to support the trial court's determination that the corporate defendants were Wright's alter egos.

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[13] Wright's other challenge to the judgment fails for similar reasons. He argues (1) that Nesh, as his attorney, was required to provide him adequate advisements about the loans, as required by the Rules of Professional Conduct, rules 3-300 and 4-210, and (2) that Nesh failed to provide these advisements. At trial, Nesh testified that he gave Wright the requisite advisements, and the trial court accepted Nesh's testimony on this matter. There was no error.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.